UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLY KIWEWA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:15-cv-815
	)	
	)	
MEGAN J. BRENNAN,	)	Litkovitz, M.J.
Postmaster General,	)	
United States Postal Service,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Megan J. Brennan, Postmaster General for the United States Postal Service ("Defendant" or the "Postal Service"), pursuant to Federal Rule of Civil Procedure 56, hereby moves for summary judgment in her favor. This lawsuit should be dismissed because the evidence obtained through discovery to date establishes that Plaintiff has failed to meet his burden with respect to all alleged instances of discrimination. Moreover, Defendant has articulated legitimate, non-discriminatory reasons for its actions, which Plaintiff cannot show to be pretext. This motion is supported by the Deposition of Willy Kiwewa, and the Declarations of Rochelle Evans, Manager Customer Services, Thomas Stacy, Manager Customer Services, and Laurie Benson, Supervisor Payroll Services.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On April 21, 2014, Willy Kiwewa ("Plaintiff") filed this lawsuit against Defendant, alleging that he was discriminated against on the basis of his national origin, Democratic Republic of Congo. The Equal Employment Opportunity Commission ("EEOC") accepted the following four issues for investigation, and these issues serve as the basis for Plaintiffs Complaint before this Court: (1) on December 24, 2013, Plaintiff was terminated from employment during probation; (2) on a date to be specified, he was not paid appropriately, and subsequently, he received a money order for the missing hours without deductions taken out; (3) his Postal Service Form 50, Notification of Personnel Action, inaccurately indicates that he voluntarily resigned effective February 20, 2014; and (4) as of June 19, 2014, he was not paid for accumulated to leave to which he was entitled. *See* Acknowledgement/Acceptance of Amendment to Complaint, attached hereto as Exhibit 1; Amended Compl. (Doc. No. 27, PAGEID #412, 414-415, 417-419.)

In support of his claims, Plaintiff has proffered no direct evidence of discrimination, and he cannot carry his burden of proof through circumstantial evidence; Plaintiff has failed to identify any appropriate comparator employees and several of his four claims are demonstrably false. Furthermore, Defendant has articulated legitimate-nondiscriminatory reasons for its actions, which Plaintiff cannot show to be pretext, even when viewing all facts in the light most favorable to Plaintiff. As will be discussed below, because the record contains no genuine dispute of material facts, Plaintiff's lawsuit should be dismissed.

II. STATEMENT OF FACTS

Plaintiff began his employment with Defendant on November 2, 2013 as a City Carrier Assistant ("CCA"). *See* Postal Service ("PS") Form 50, attached hereto as Exhibit 2. After he finished CCA training, Plaintiff began working at the Parkdale Branch, under Manager Rochelle Evans' supervision, on November 21, 2013. *See* Declaration of Rochelle Evans at ¶ 3, attached hereto as Exhibit "3". Pursuant to Article 12 of Handbook EL-901, 2011-2016 National Agreement between the National Association of Letter Carriers ("NALC") and Defendant, CCAs are subject to a ninety-day probationary period.[1] Defendant terminated Plaintiff's employment within his ninety-day probationary period, on December 24, 2013, due to Plaintiff's performance issues and his failure to follow Postal Service rules and regulations. *See* Notice of Separation, attached hereto as Exhibit 4.

Manager Evans consistently explained that she issued Plaintiff a Notice of Separation due to his continued performance issues and failure to follow his direct supervisors' orders. *See* Rochelle Evans EEO Affidavit at ¶ 5, attached hereto as Exhibit 5; *see also* Ex. 3 at ¶¶ 6-8. Throughout Plaintiff's short tenure with Defendant, he also worked for Manager Thomas Stacy at the Sharonville Branch on four occasions, at which times Plaintiff experienced similar difficulty in efficiently completing his assigned duties and following supervisors' instructions. *See* Declaration of Thomas Stacy at ¶¶ 4-6, attached hereto as Exhibit 6. By Plaintiff's own admission, he felt that some of his duties were "impossible." *See* Deposition of Willy Kiwewa at 23:11, attached hereto as Exhibit 7. In efforts to help Plaintiff improve his performance, Managers Evans and Stacy invested time in training Plaintiff and put him on the same routes day after day so that he could gain familiarity and increase his efficiency; however, Plaintiff failed to show improvement. *See* Ex. 3 at ¶¶ 6-8; Ex. 6 at ¶¶ 4-6. In addition, Plaintiff disregarded his supervisors' direct instructions on several occasions when he refused to deliver parcels. *See* Ex. 3 at ¶ 7. As Plaintiff's poor performance significantly disrupted Defendant's efficiency of service at both the Parkdale and Sharonville Branches, Manager Evans issued him a Notice of Separation on December 24, 2013.[2] *See id.* at ¶ 8.

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[1] Article 12, Section 1 (A) provides: "The probationary period for a new employee shall be ninety (90) days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto." *See* Ex. 3 at ¶ 5.

III. ARGUMENT

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of demonstrating that no genuine issues of material fact exist, and that taking the evidence together, a reasonable jury could not return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). In order for a nonmoving party to defeat summary judgment, the nonmoving party must put forth "'significant probative' evidence in support of its position." *Anderson*, 477 U.S. at 249–50.

Under Title VII, it shall be unlawful for an employer "to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race [ ] or national origin." *See Weeks v. Michigan, Dep't of Cmty. Health*, 587 F. App'x 850, 855 (6th Cir. 2014) (quoting 42 U.S.C. § 2000e–2(a)(1)). A plaintiff may produce direct evidence of discrimination to establish a claim, or proffer circumstantial evidence to support an inference of discrimination; if the plaintiff relies upon circumstantial evidence, courts apply the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Shazor v. Prof'l Transit Mgmt., Ltd.*, 744 F.3d 948, 955 (6th Cir. 2014).

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[2] Despite Manager Evans' clear intention that Plaintiff be involuntarily separated due to performance issues, Plaintiff's final PS Form 50, as processed by the separate human resources entity, the Human Resources Shared Services Center ("HRSSC"), contained a clerical error, as it noted that he voluntarily retired. *See* Amy Daugherty Email, attached hereto as Exhibit 8.

"Direct evidence, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Grizzell v. City of Columbus Div. of Police*, 461 F.3d 711, 719 (6th Cir.2006). As the Southern District of Ohio has observed, "an express statement by a decision-maker of a desire to terminate employees because they belong to a protected class would constitute direct evidence of discrimination." *Nair v. Columbus State Cmty. Coll.*, 2008 WL 483333, at *12 (S.D. Ohio Feb. 19, 2008). Accordingly, "comments made by individuals who are not involved in the decision-making process regarding plaintiff's employment do not constitute direct evidence of discrimination." *Sami v. Detroit Med. Ctr.*, 591 F. App'x 419, 425 (6th Cir. 2014). "Once a plaintiff produces direct evidence of discrimination, the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive. *See Shazor*, 744 F.3d at 955 (quoting another source) (internal quotation marks omitted).

With circumstantial evidence, a plaintiff must establish a *prima facie* case of discrimination as follows: (1) he is a member of a protected class; (2) he suffered an adverse action; (3) he was qualified for the position that he held; and (4) similarly-situated employees not in his protected group were treated more favorably.[3] *See Shazor*, 744 F.3d at 957; *see also*

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[3] The Sixth Circuit recognizes the last element as an alternative way of establishing the final element of a plaintiff's *prima facie* showing in cases where the plaintiff is not replaced with a single person. *See Shazor*, 744 F.3d at 958. Where the employer hires a single replacement to do the same job, the "replacement method" is utilized, and the plaintiff must establish that he was replaced by someone outside of the protected class. *Id.* at 959 (explaining that the replacement method was appropriate where the employer "had and continues to have just one CEO. Before August 2010, that was Plaintiff. Three

Hinson v. Univ. of Cincinnati, 2015 WL 6690161, at *4 (S.D. Ohio Nov. 2, 2015). If the plaintiff satisfies his burden, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir. 2009). If the employer carries its burden, the burden shifts back to the plaintiff to show pretext. Although the burden of production, *i.e.*, "going forward," may shift, the burden of persuasion, by a preponderance of the evidence, remains at all times on the plaintiff. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). "[T]o survive summary judgment a plaintiff need only produce enough evidence to support a prima facie case and to rebut, but not to disprove, the defendant's proffered rationale." *Griffin v. Finkbeiner*, 689 F.3d 584, 593 (6th Cir. 2012).

The evidence offered in connection with each of Plaintiff's claims of alleged discrimination is analyzed below.

A. Defendant Is Entitled to Judgment as a Matter of Law that Plaintiff's Removal was Not Discriminatory

1. Plaintiff Has Proffered No Direct Evidence of Discrimination in Connection with his Removal

The only evidence that Plaintiff alleges constitutes direct evidence requires that the factfinder draw multiple inferences in order to conclude that the challenged employment action was motivated by discrimination, such that this evidence is circumstantial at best. *See Romans v. Michigan Dep't of Human Servs.*, 668 F.3d 826, 836 (6th Cir. 2012) ("direct evidence of discrimination does not require a fact finder to draw any inferences in order to conclude that the

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months later, it was [another employee]"). Here, however, application of the replacement method is not practicable, as during the time that Plaintiff worked at the Parkdale and Sharonville Branches, there were approximately twenty-one other CCAs working at both stations. *See* Ex. 3 at ¶ 9. In addition, 291 CCAs were hired for branches in the City of Cincinnati, Ohio in the year period after December 24, 2013, seventeen of which were assigned to the Parkdale Branch, and ten of which were assigned to the Sharonville Branch. *See* List of CCAs Hired, attached hereto as Exhibit 22.

challenged employment action was motivated, at least in part by prejudice against members of the protected group"). Here, the direct evidence advanced by Plaintiff is in connection with an explanation offered by Manager Stacy when he was interviewed by the EEO investigator almost five months after Plaintiff's termination. The EEO investigator reported the following: "Manager Stacy states that he believes the Counselee [Plaintiff] tried to perform his duties to the best of his abilities; however, he was slow and it appears to be a cultural gap as well as written and verbal barriers for the Counselee." *See* EEO Counselor's Report at 4, attached hereto as Exhibit 9. Plaintiff's reliance on Manager Stacy's innocuous May 2014 statement as direct evidence is misplaced, as this statement does not compel the conclusion, without the need to draw multiple inferences, that the challenged employment action was motivated by discrimination as required under Sixth Circuit law. Where, as here, "the relevance of the comment is provided by inference," the comment does not constitute direct evidence of discrimination. *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003) (internal quotation marks omitted).

First and foremost, on its face, Manager Stacy's comment cannot be said to imply discriminatory animus, as "comments that are vague, *not overtly discriminatory in nature*, and not made by decision-makers do not constitute direct evidence of discrimination." *Chambers v. City of Cincinnati*, 2015 WL 881179, at *6 (S.D. Ohio Mar. 2, 2015) (emphasis added); *see also Hunter v. Sec'y of U.S. Army*, 565 F.3d 986, 997 (6th Cir. 2009) (citing *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 491 (7th Cir. 2007) (holding that isolated comments and "stray remarks," without more, are insufficient to establish discriminatory intent)).[4] Simply put,

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[4] *See Griffin v. Finkbeiner*, 689 F.3d 584, 596 (6th Cir. 2012) (explaining, "Even if made by a relevant speaker, [i]solated and ambiguous comments will not support a finding of discrimination") (internal quotation marks omitted)).

Manager Stacy's May 2014 statement was merely his attempt to explain why he believed Plaintiff experienced such significant performance difficulties, and this does not alter the undisputed fact that Plaintiff was fired by Manager Evans for performance issues. *See* Ex. 4. Importantly, Plaintiff testified at his deposition that he did not know whether his supervisors ever complained about his command of the English language.[5]

It would require additional inferences to conclude that Manager Stacy sought Plaintiff's removal, or that Manager Stacy wanted Manager Evans to remove Plaintiff. Notably, Manager Stacy was not the ultimate decision-maker regarding Plaintiff's termination, as Manager Evans made that decision. *See* Ex. 5 at ¶ 5 ("I made the decision to terminate [Complainant]"); Ex. 4; Ex. 3 at ¶ 8; *see also* Thomas Stacy EEO Affidavit at 2, ¶ 5, attached hereto as Exhibit 9 ("I was not the official that performed the action," referencing the termination of Plaintiff's employment); Ex. 6 at ¶ 7. In fact, it is undisputed that Plaintiff only worked for Manager Stacy four times over the course of his approximately month on the job. *See* Ex. 7 at 19:1; *see also* Ex. 6 at ¶ 3. As in *Johnson*, Manager Stacy merely provided Manager Evans with the equivalent of "supervisor surveys," such that his May 2014 statement is that of a non-decision maker, which "cannot suffice to satisfy the plaintiff's burden of demonstrating animus." *See Johnson v. Metro Gov't of Nashville & Davidson Cty., Tenn.*, 502 F. App'x 523, 535 (6th Cir. 2012) (quoting another source). No part of Manager Stacy's May 2014 statement, even when viewing all facts in the light most favorable to Plaintiff, could compel the conclusion that he sought to have

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[5] *See* Ex. 7 at 56:13-16 ("Q: Did your supervisors ever complain about your language during this? A. I don't know. If you are some of them, I don't know.")

Plaintiff removed from his position,[6] let alone that he wanted Manager Evans to remove Plaintiff from his position.

Furthermore, because Manager Stacy's May 2014 statement post-dates Plaintiff's December 2013 termination by approximately five months, additional inferences are required to conclude that his May 2014 opinion motivated Manager Evans' action in December 2013. *See, e.g.*, *Suits v. The Heil Co.*, 192 F. App'x 399, 403 (6th Cir. 2006) (explaining that where stray comments were made up to three months before the plaintiff's termination, " it is not possible to demonstrate sufficient nexus between the attitude that might be reflected in the remarks and the adverse employment action").[7] Notably, Manager Stacy's contemporaneous comments and feedback to Manager Evans about Plaintiff's performance evince no discriminatory intent and instead focus solely on Plaintiff's performance issues. *See* Thomas Stacy December 13, 2013 Email, attached hereto as Exhibit 11. In a December 13, 2013 email, Manager Stacy noted that

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[6] *See also Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003) (explaining, "Deriving this purported desire from [the employer's] comment requires the inferential step of concluding that because [the employer] held this belief, he would want to have [plaintiff's] employment terminated").

[7] While "there is some tension" in Sixth Circuit precedent "on the issue of when direct evidence can be based on discriminatory statements that are not temporally proximate to an employment decision," the Sixth Circuit has previously "held that when managers make age-biased statements outside the context of the decision to discharge the plaintiff, the statements are not direct evidence of age discrimination." *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 347 (6th Cir. 2012) (citing *Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 550 (6th Cir. 2004)). Here, Manager Stacy's May 2014 statement was clearly made months after Manager Evans' December 2013 decision to terminate Plaintiff's employment, such that it should not be construed as direct evidence on this basis. *Cf. Baba-Singhri v. Central State University*, 2008 WL 656497 (Mar. 10, 2008 S.D. Ohio) (holding that comment made by plaintiff's supervisor regarding plaintiff's "thick African accent" was not direct evidence of discrimination because "the Court would have to infer that the animus that [plaintiff's supervisor] exhibited in this statement made in the summer of 2001 was related to [plaintiff's] termination approximately 18 months later"); *see also Wilson v. Chipotle Mexican Grill, Inc.*, 580 F. App'x 395, 399 (6th Cir. 2014) (explaining, "By the time of the comment, the predicates for firing Wilson had already taken place"); *Johnson v. Metro Gov't of Nashville*, 502 F. App'x at 534–35 (explaining, "First, the memo is three years removed from the events of this case, and from it we would need to infer that Anderson's opinions in 2003 motivated his actions in 2005–2006"); *Hansberry v. Father Flanagan's Boys' Home*, 2004 WL 3152393, at *7 (E.D.N.Y. Nov. 28, 2004) (finding, "there is no evidence that any of DiLauro's stray remarks—influenced his decision to recommend termination and certainly no evidence that his stray remarks had any input on the other decisionmakers' rationale for terminating plaintiff").

Plaintiff "today again had many issues," and that he "spent about 30 minutes with him and trying to help him and assist in helping him improve his time." *Id.* After another employee similarly, and unsuccessfully, attempted to help Plaintiff improve his time, Manager Stacy concluded that Plaintiff "doesn't seem to be grasping it." *Id.* In addition, Manager Stacy's EEO Affidavit composed during the Agency's EEO investigation reveals no discriminatory animus (*see generally* Ex. 10), and neither does his December 27, 2013 email to Manager Evans; rather Manager Stacy's December 27, 2013 email merely discusses Plaintiff's performance issues (*see* Thomas Stacy December 27, 2013 Email, attached hereto as Exhibit 12).

For these reasons, it would require multiple inferences to conclude that Manager Stacy's comment was motivated by prejudice and that he intended to cause an adverse employment action through Manager Evans. Because multiple inferences are "required from the circumstantial evidence to find racial animus or that unlawful discrimination was at least a motivating factor," Manager Stacy's May 2014 statement is not direct evidence of discrimination. *Bonner v. Scope Servs., Inc.*, 2015 WL 4465038, at *4 (S.D. Ohio July 21, 2015). As Plaintiff has produced no direct evidence of discrimination, he must proceed with circumstantial evidence through application of the *McDonnell Douglas* burden-shifting framework.

2. Plaintiff Cannot Show that his Removal Was Discriminatory Based on Circumstantial Evidence

While it is undisputed that Plaintiff is a member of a protected class and that his removal constitutes an adverse action, and assuming, for purposes of this Motion that Plaintiff was qualified for the position that he held, he cannot make out a *prima facie* case of discrimination. Plaintiff has failed to identify similarly-situated employees outside his protected group who were treated more favorably. "To establish that the proffered comparator employees are similarly situated, a plaintiff must show that he and his proposed comparators were similar in all relevant respects and that he *and his proposed comparators engaged in acts of comparable seriousness*." *Craig-Wood v. Time Warner N.Y. Cable LLC*, 549 F. App'x 505, 509 (6th Cir. 2014) (internal quotation marks omitted) (emphasis added); *see also Tennial v. United Parcel Serv., Inc.*, 840 F.3d 292, 309 (6th Cir. 2016) (specifying that the plaintiff "must show that the proposed comparators' conduct was similar in kind and in severity to his own"). In the disciplinary context, the comparator employees must have "dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992); *see also Williams v. U.S. Postal Serv.*, No. 1:09-CV-752, 2011 WL 2559437, at *10 (S.D. Ohio June 28, 2011).[8]

Beyond Plaintiff's mere allusions to other employees and bare assertions that the employees he identified were not fired, and that they are outside his protected class,[9] he has presented no facts or evidence to establish that they are similarly-situated to him in all relevant aspects, including whether they engaged in conduct comparable to that for which he was discharged. In *Mitchell*, the Sixth Circuit found that plaintiff failed to establish a claim for discrimination because "[p]laintiff produced no facts to establish that the two white employees

[8] This requirement of similarity in all relevant aspects is interpreted fairly strictly. *See, e.g.*, *Craig-Wood v. Time Warner N.Y. Cable LLC*, 549 F. App'x 505, 509 (6th Cir. 2014) (granting defendant's motion for summary judgment where "plaintiff has not identified any DSRs outside of her protected class who had a zero-sales day but did not have their vacation days reduced"); *see also Craig-Wood v. Time Warner N.Y. Cable LLC*, 549 F. App'x 505, 510 (6th Cir. 2014) (finding that plaintiff failed to establish similarly-situated comparators because "she offers no evidence that Tyus was similarly situated in other relevant respects such as seniority, productivity, profitability, or other non-discriminatory factors Beckley could—and most likely would—consider in determining which DSR to assign a particular sales route").

[9] The only evidence that Plaintiff has proffered regarding the alleged comparators' national origin is the following conclusory deposition testimony: "Yeah, well, no, I was the only one that came from Africa. Yeah, all of the people was African American" (Ex. 7 at 59:3-4); and, "They were born here so they don't have an accent" (*id.* at 59:9-10).

she identified as not having been fired were 'similarly situated in all respects.'" *Mitchell*, 964 F.2d at 583 (explaining, plaintiff "did not produce sufficient information about Ms. Lind's alleged absenteeism and Ms. Walley's insubordination to indicate whether the absenteeism and insubordination were of 'comparable seriousness' to the conduct for which Plaintiff was discharged"). Citing the Sixth Circuit in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir.1998), the Southern District of Ohio has made clear that a plaintiff will not be able to establish a *prima facie* case where the plaintiff merely makes an "allusion to this other employee," as this "does not satisfy the comparator employee standard." *Boker v. Sec'y, Dep't of Treasury*, 2009 WL 3199074, at *8 (S.D. Ohio Sept. 29, 2009).

Specifically, Plaintiff has merely asserted that ten other CCAs were not discharged without proffering any evidence whatsoever on whether that they had any performance issues, much less any performance issues comparable to his own. Plaintiff named the following employees in connection with his second discovery requests: Jamaya Armstrong,[10] Jomar Harris, David Sparks, Jacob Bingham, and Stephen Blue. *See* Plaintiff's Second Request for Discovery to Defendant at 2, attached hereto as Exhibit 13. In his Amended Complaint, Plaintiff identifies the following CCAs, claiming that they were "not terminated because it [sic] had been assisted"[11]: Danny Bell, Cedreci Copeland, Dalton Grubbs, Jareck West, and Jeron Zeigler. (Amended Compl. (Doc. No. 27, PAGEID #415-16).) However, Plaintiff was not discharged because he had "been assisted"; Plaintiff was discharged for his repeated failure to improve on his delivery times and for his refusal to follow his supervisors' direct instructions. *See* Ex. 5 at ¶¶ 6, 7; Ex. 6 at ¶¶ 4-6; Ex. 11; Ex. 12; Joshua Witt Written Statement, attached hereto as Exhibit

[10] After investigation, it is unclear whether there was ever a CCA employed by this name.
[11] By "assisted," Plaintiff presumably refers to the process by which another employee is called to help on another employee's route when the latter employee will not be able to finish delivery in time.

14; Douglas Pieper Written Statement, attached hereto as Exhibit 15. In sum, Plaintiff has provided no evidence sufficient to satisfy Sixth Circuit precedent to carry his burden of demonstrating similarity in all relevant aspects, namely whether these employees engaged in similar conduct. Therefore, this mere allusion to these employees is insufficient under Sixth Circuit and Southern District of Ohio precedent.

For all these reasons, there exists no genuine dispute of material fact that Plaintiff has failed to identify proper comparator employees. Accordingly, Defendant is entitled to judgment as a matter of law that Plaintiff cannot establish a *prima facie* case of discrimination concerning his removal.

3. Defendant Has Articulated Legitimate, Non-discriminatory Reasons for Removing Plaintiff that He Cannot Show to Be Pretext

Assuming, *arguendo*, that Plaintiff can establish a *prima facie* case, Defendant fired Plaintiff for his documented performance issues, including slow delivery times and failure to follow Agency policies, which is supported by Plaintiff's own sworn deposition testimony. As discussed below, Plaintiff's own comments about his performance deficiencies are substantively the same as those reasons cited by his supervisors leading up to his discharge. Plaintiff testified that Manager Stacy "thought I wasn't able to perform my job," and that he said "I was slow" and "wasn't able to handle the mail and to use arrow keys," which are "what we use to open the mail." Ex. 7 at 49:1-5. Notably, referring to management's ability to evaluate carriers' performance on routes, Plaintiff acknowledged that management utilizes objective criteria:

> We have regular mail. Those routes are evaluated. It is not fictional. They evaluate it, they know. They know how much time you have to spend. They have the minimum time you have to spend. They know better. Those routes are evaluated. There is not something fictional. They know exactly what time I should come back.

Id. at 62:23-24-63:1-6. In so testifying, there is no genuine dispute of material fact that management used objective criteria to evaluate Plaintiff's performance.

Plaintiff testified that management made efforts to help him improve his delivery times, and he also noted that there was little difference between his duties in Sharonville and Parkdale: "It wasn't different, it was the same, the same job. Deliver and collect the mail." *Id.* at 19:11-13. Plaintiff acknowledged that Manager Stacy "instructed his team to put [him] back on the route that [he] had already done" (*see id.*), because Manager Stacy "was the one, [sic] it's okay, let's put Willy in the same route he done [sic] before and we will see if he can improve" (*id.* at 49:6-8). This is consistent with Manager Stacy's sworn statements, as he has asserted that he put Plaintiff on the same routes in attempts to help him to improve his delivery times. *See* Ex. 6 at ¶ 4. Plaintiff further testified that he was put on the same routes at Parkdale under Manager Evans: "In Parkdale, most of the time I did the same route. My route, my regular route was the Route 9, Route 72, Route 9, 72, 49 or 39. That was my regular. But I also have Route 21." Ex. 7 at 62:8-13. This is consistent with Manager Evans' statements, as Manager Evans and her team similarly attempted to help Plaintiff improve his delivery times by putting him on the same routes, day after day. *See* Ex. 3 at ¶ 6. Yet, Plaintiff failed to demonstrate improvement. *See id.* at ¶¶ 6-8.

Further evidence of Plaintiff's performance deficiencies, and refusal to follow instructions and policies is found in Plaintiff's sworn deposition testimony concerning his refusal to deliver certain mail and parcels. For example, Manager Stacy noted that Plaintiff refused to deliver parcels that he claimed were not on his route (*see* Ex. 12), which is consistent with Plaintiff's testimony. Plaintiff effectively admitted to refusing to deliver mail for Manager Stacy during his deposition:

> Q: Do you recall th[at] supervisor Stacy when you were at Sharonville said you were not delivering all of the mail and you said certain parcels are not on your route? A: Yeah, we, I guess we talked about that. . . . Yes, we talked about that.

Ex. 7 at 19:14-21. Referring to Manager Stacy's statement above, Plaintiff then testified, "I do understand why he did that," as Plaintiff explained that he failed to appreciate the importance of timely delivering business mail. *Id.* at 27:2-16. Plaintiff further testified that on at least one occasion, he needed help finishing his route, and he characterized his job of delivering Amazon parcels as "difficult."[12] *Id.* at 22:17. By his own admission, he even felt that some of his duties were "impossible." *Id.* at 23:11. Plaintiff also testified that he got lost trying to deliver a piece of express mail for Manager Evans on December 17, 2013 and kept a customer waiting for the packages. *See id.* at 39:12-24-41:1-10.

Despite his admitted performance issues, Plaintiff attempts to argue that the fact that he never received a written performance evaluation during his probationary period constitutes evidence of pretext. (Amended Compl. (Doc. No. 27, PAGEID #415).) Probationary employees do receive evaluations after they have worked thirty days, sixty days, and ninety days. *See* Postal Service Form 1750, attached hereto as Exhibit 16; *see also* Ex. 3 at ¶ 5. However, Plaintiff only worked at the station from November 21, 2013 (after his training period ended) through his separation on December 24, 2013, for a total of thirty days, and this was the total of the period subject to the thirty-day Form 1750 evaluation period. *See* Attendance Records, attached hereto as Exhibit 17[13]; *see also* Ex. 3 at ¶ 3. As such, and due to Plaintiff's performance issues, which significantly disrupted operations at the station (*see* Ex. 3 at ¶ 8), there was insufficient time to conduct Plaintiff's thirty-day evaluation prior to Plaintiff's separation.

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[12] Plaintiff's inability to perform his duties competently and to be able to follow Agency policies is further exemplified by the following testimony: "The volume of the mail and the time, the Christmas season and the new year. People shopping a lot. We have more volume increase. So why to put the regular mail and all of the parcels on Amazon to load my car when I didn't load it myself and send me down there." Ex. 7 at 55:18-24.

[13] Per Plaintiff's attendance records, he worked the following days under Manager Evans' supervision: three days during pay period 2013-25-1 (including November 20, 2013); five days during pay period 2013-25-2 (including November 25 and 27, 2013); six days during pay period 2013-26-1 (including

For all these reasons, and by Plaintiff's own admission, he had significant difficulties performing his duties, which at times proved "impossible" for him. Ex. 7 at 23:11. Because significant probative evidence of Plaintiff's performance issues and failure to follow Agency policies comes from his own sworn testimony, which is consistent with his supervisors' complaints, Plaintiff cannot meet his burden at the summary judgment stage of showing "genuine disputes of fact regarding the legitimacy of the defendant's stated reasons," as required under Sixth Circuit precedent to show pretext. *See, e.g.*, *Wheat v. Fifth Third Bank*, 785 F.3d 230, 240 (6th Cir. 2015). Specifically, a plaintiff can establish pretext "by showing (1) that the proffered reasons had no basis *in fact,*[14] (2) that the proffered reasons did not *actually* motivate [his discipline], or (3) that they were *insufficient* to motivate discharge." *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 349 (6th Cir. 2012) (emphasis in original). The Sixth Circuit explained:

> The first category implicates evidence "that the proffered bases for the plaintiff's discharge never happened," and the second category requires that the plaintiff "admit[ ] the factual basis underlying the employer's proffered explanation and further admit[ ] that such conduct could motivate dismissal." The third category of pretext consists of evidence that other employees, particularly employees outside the protected class, were not disciplined even though they engaged in substantially identical conduct to that which the employer contends motivated its discipline of the plaintiff.

Chattman v. Toho Tenax Am., Inc., 686 F.3d 339, 349 (6th Cir. 2012) (quoting *Manzer v. Diamond Shamrock Chemicals. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)). Here, based on Plaintiff's sworn testimony and statements, as detailed above, he has admitted that: the proffered

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December 6, 2013); six days during pay period 2013-26-2; seven days during pay period 2014-1-1; and three days during pay period 2014-1-2 (including December 22, 2013). *See* Ex. 17.

[14] "In other words, Plaintiff must establish a genuine issue of fact as to whether her statements were lies." *Shazor v. Prof'l Transit Mgmt., Ltd.*, 744 F.3d 948, 959 (6th Cir. 2014).

bases for the discharge occurred, thereby foreclosing the first category of pretext evidence; the employer's proffered explanation is factually-plausible and that such conduct actually motivated his dismissal, which forecloses the second category of pretext evidence; and he can identify no employees outside his protected class who engaged in substantially identical conduct, thereby foreclosing the third available category of pretext evidence. Thus, Defendant is entitled to judgment as a matter of law that Plaintiff was discharged for a legitimate, non-discriminatory reason, which Plaintiff cannot show to be pretext.

B. Defendant Is Entitled to Judgment as a Matter of Law Regarding the Remaining Instances of Alleged Discrimination

In support of his remaining claims of discrimination, Plaintiff has either offered no evidence at all, or only circumstantial evidence. However, Plaintiff cannot make out a *prima facie* case of discrimination for any of the remaining allegations of discrimination, especially with regard to two claims, which as alleged, are demonstrably untrue.

1. Plaintiff Cannot Establish a *Prima Facie* Case of Discrimination for the Allegation that He was Not Paid Appropriately

Plaintiff claims that the clerical errors in processing his paystubs for five days of work constitute discrimination. Notably, the first time that Plaintiff ever identified the actual days for which he was missing pay were in connection with his original Complaint, filed on December 23, 2015. (Compl. (Doc. No. 1).) During the discovery process in October 2016, Defendant conducted extensive investigations into Plaintiff's allegations and determined that he had not been paid for the dates of November 20, 25 and 27, and December 6 and 22, 2013; upon this discovery, Defendant immediately worked to ensure that Plaintiff received proper compensation for these days of work, and relied on Plaintiff's own accounts of the number of hours worked on each of those days to calculate the outstanding compensation; Plaintiff received the adjustment check for these missing hours on January 6, 2017. *See* Adjustment Check, attached hereto as Exhibit 18.

Though it is unclear why this clerical error resulted,[15] Plaintiff cannot make out a *prima facie* case of discrimination regarding this allegation for two reasons. First, it is undisputed that Plaintiff was ultimately compensated for these hours of work. In light of the temporary nature of this clerical error, it cannot be considered an adverse action. *See Mullins v. U.S. Bank, N.A.*, 2007 WL 2071906, at *7 (S.D. Ohio July 17, 2007), *aff'd sub nom. Mullins v. U.S. Bank*, 296 F. App'x 521 (6th Cir. 2008) (explaining, "the temporary cessation of her short-term disability benefits that led to a delay in the receipt of her benefits, caused by Kessler's clerical error in processing her termination, does not constitute adverse action").[16] Second, beyond mere allusion to other alleged comparators by name, and his statement that these employees "were correctly paid" (Amended Compl. (Doc. No. 27, PAGEID #418)), Plaintiff has proffered no evidence whatsoever to satisfy his burden to demonstrate that similarly-situated employees outside his protected class were treated more favorably. *See Boker*, *supra*. Consequentially, Defendant is entitled to judgment as a matter of law that Plaintiff cannot establish a *prima facie* case of discrimination concerning his compensation.

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[15] It is undisputed that Plaintiff was responsible for keeping his own timekeeping records and that he was then required to submit them to a supervisor, who would then input the records into the Agency's timekeeping system. *See* Ex. 7 at 11:6-9. However, as evidenced by Plaintiff's own testimony, it is possible that Plaintiff's own timekeeping records contained errors, which made processing his time difficult and inaccurate. At his deposition, Plaintiff testified as follows:

> Q: So you believe that you are owed 40 hours of work and that's a total of your salary that's short?
> A: Yeah, yeah. I have at least, because they calculated, they using military time to calculate the time. I don't use military time. I don't know exactly how it works. But any time I finish my duty I went back home and type in the computer in regular time. But I don't use military time.

Ex. 7 at 81:5-16.

[16] *See also Bowman v. Shawnee State University*, 220 F.3d 456, 459-60 (6th Cir. 2000) ("Even if we assume that the loss of the . . . position constitutes a significant change in employment status, there is no tangible employment action in this case because the very temporary nature of the employment action in question makes it a non-materially adverse employment action"); *see, e.g., Wilson-Simmons v. Lake Cty. Sheriff's Dep't*, 982 F. Supp. 496, 502 (N.D. Ohio 1997) (explaining, "Although Ms. Wilson–Simmons suffered a slight delay in receiving her overtime pay, there is nothing to suggest that this single, isolated event constituted anything other than a clerical oversight. Therefore, this incident does not rise to the level of an adverse employment action particularly in this case where the evidence reveals the Lake County Sheriffs Department processed a large amount of overtime and immediately remedied the situation when notified of the error").

2. Plaintiff Cannot Establish a *Prima Facie* Case Concerning the Clerical Error on his Form 50

Plaintiff claims that the clerical error in processing his final Form 50 constitutes discrimination, as it originally noted that he voluntarily resigned rather than being fired. (Amended Compl. (Doc. No. 27, PAGEID #418).) Here, it is undisputed that Manager Evans intended that Plaintiff be involuntarily separated from the Agency due to his performance issues. *See* Ex. 4; Ex. 5 at ¶ 5; Ex. 3 at ¶ 8. However, and for unknown reasons, when Plaintiff's personnel information was transferred for processing to the separate human resources entity, HRSSC, HRSSC mistakenly processed the separation as a voluntary resignation, which Amy Daugherty, Supervisor Customer Service Support, attempted to promptly rectify, as will be discussed below. Ultimately, Plaintiff cannot make out a *prima facie* case with regard to this allegation for several reasons.

First and foremost, this clerical error does not constitute an adverse action. *See Mullins*, *supra*. Typically, to be considered adverse, the alleged action must have some sort of "palpable negative effect." *See Foster v. Michigan*, 573 F. App'x 377, 395 (6th Cir. 2014) (explaining, "Unless this negative evaluation had palpable negative effects, it is not actionable").[17] Moreover, "*de minimis* employment actions are not materially adverse and, thus, not actionable." *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 462 (6th Cir. 2000) (quoting another source); *see*

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[17] An adverse employment action is "a materially adverse change in the terms of . . . employment," and examples include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Kocsis v. Multi–Care Management, Inc.*, 97 F.3d 876, 885-86 (6th Cir. 1996).

also Kauffman v. Allied Signal, Inc., Autolite Div., 970 F.2d 178 (6th Cir.1992) (even where a tangible job detriment has been suffered, there may be a *de minimis* exception for temporary actions or where further remedial action is moot and no economic loss occurred). Here, Plaintiff has alleged no evidence that the clerical error of reporting that he voluntarily resigned, rather than being fired, resulted in any negative effect, such that it does not constitute an adverse action. Furthermore, the temporary nature of this clerical error makes it non-materially adverse, *see Mullins*, *supra*, as Ms. Daugherty attempted to correct it immediately to reflect management's clear intention to fire Plaintiff for performance issues. *See* Ex. 8; *see also* Corrected PS Form 50, attached hereto as Exhibit 19.

Plaintiff's claims with regard to this allegation also fail because he has not alleged that any similarly-situated employees outside of his protected class were treated more favorably. *See, e.g.*, *Wilson-Simmons v. Lake Cty. Sheriff's Dep't*, 982 F. Supp. 496, 501–02 (N.D. Ohio 1997) (explaining, regarding clerical errors, "Even if these circumstances could be considered adverse employment actions, there has been no evidence provided to suggest that any members of a non-protected class were treated differently . . . . Thus [plaintiff] cannot demonstrate a prima facie case of disparate treatment").

For all these reasons, Plaintiff cannot establish a *prima facie* case on this issue and Defendant is entitled to judgment as a matter of law.

3. Plaintiff's Allegation that Appropriate Deductions Were Not Withheld from the Money Order He Received Is False

Per Agency policy, no deductions are taken from an employee's money order, as the amount of the money order is already sixty-five percent or less than the gross amount due in order to account for the taxes that were taken from the payment, as was the case with the money order issued to Plaintiff. *See* Ex. 3 at ¶ 11. Plaintiff's relevant payroll journal reflects that appropriate deductions were taken out and also reflects that the amount of the money order was recouped from the payment. *See* Declaration of Laurie Benson at ¶ 4, attached hereto as Exhibit 20. In addition, after the repayment of the money order and the withholding of taxes, Plaintiff had an additional net payment. *See id.* at ¶ 5. Plaintiff has been paid all monies due, and all appropriate deductions and withholdings were made. *See id.* at ¶ 6. For these reasons, Defendant is entitled to judgment as a matter of law on this issue.

4. Plaintiff's Allegation that he Was Not Paid for Accumulated Leave Is Patently False

After his employment was terminated, Plaintiff received a check for the accrued leave to which he was entitled. *See* Terminal Leave Check, attached hereto as Exhibit 21. Plaintiff has never disputed receiving this check, or that it was for an incorrect amount. Accordingly, this allegation is meritless, and Defendant is entitled to judgment as a matter of law on this issue.

IV. CONCLUSION

For these reasons, Defendant's motion for summary judgment should be granted and Plaintiff's Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon pro se Plaintiff on this 19th day of June, 2017, via USPS:

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